

A Ng Peng Hong v Ng Shaw Ching & Anor

HIGH COURT (KUCHING) — CIVIL REVISION NO 13-02-99-II
IAN CHIN J
2 MAY 2000

B *Tort — Negligence — Road accident — Motorcyclist emerging and turning right from side road onto main road — Duty to ensure that it was safe to do so — Distance between vehicles and speed at which bus was travelling — Standard to be applied not that of the perfect driver, but a driver using ordinary care and skill — Whether entirely negligence on part of motorcyclist to have emerged from minor side road when it was not safe to do so*

C This was a motor-vehicle accident involving a collision between a bus and a motorcycle. The sessions court apportioned 80% liability on the part of the motorcyclist and 20% on the part of the bus driver and ordered that the sum awarded as damages to the motorcyclist be apportioned accordingly. Both parties appealed.

D **Held**, dismissing the appeal of the motorcyclist and setting aside the judgment against the bus driver and his employer:

E It was an undisputed fact that the motorcyclist was emerging and turning right from the side road onto a main road, therefore it was his primary duty to ensure that it was safe to do so as he would be cutting into the paths of oncoming traffics firstly from both his right side and then from his left. Whether it was safe or not depends on whether it was possible to make it to the other side of the main road without being knock down by the bus coming from his right. This in turn depends on how far away the bus was when the motorcyclist saw it and how fast the bus was travelling at that time. The distance between the vehicles and the speed at which the bus was travelling is important in determining when the bus would stop after the brake was applied. Another factor is the time taken to apply the brake, ie how soon one reacts to a situation which calls for the brake to be applied. The standard to be applied here is not that of the perfect driver, but the driver using ordinary care and skill. Thus, when a bus driver is put in a situation where he has only a second or two to react and he failed to do so, which is only because he is not a perfectionist, he cannot be blamed if a collision should ensue when the bus driver did not himself create the emergency of the motorcyclist emerging from the minor side road. Therefore, on the facts of the case, it was entirely negligence on the part of the motorcyclist to have emerged from the minor side road when it was not safe to do so (see pp 406D–G, 408A–C, F).

[Bahasa Malaysia summary]

I Ini adalah satu kemalangan kenderaan motor yang melibatkan satu pelanggaran antara sebuah bas dan sebuah motosikal. Mahkamah sesyen telah membahagikan 80% liabiliti ke atas

penunggang motosikal dan 20% ke atas pemandu bas dan memerintahkan agar jumlah yang diawardkan sebagai ganti rugi kepada penunggang motosikal dibahagikan sewajarnya. Kedua-dua pihak membuat rayuan.

Diputuskan, menolak rayuan penunggang motosikal dan mengetepikan penghakiman terhadap pemandu bas dan majikan:

Adalah satu fakta yang tidak boleh dipertikaikan bahawa penunggang motosikal tersebut sedang menuju dan ingin memusing ke kanan dari jalan tepi ke satu jalan besar, oleh itu adalah kewajipan utama beliau untuk memastikan bahawa adalah selamat berbuat demikian kerana beliau akan memotong jalan hala kenderaan di seberang jalan dahulu daripada kedua-dua belah kanan beliau dan kemudian dari belah kiri beliau. Sama ada keadaan adalah selamat atau tidak bergantung kepada sama ada adalah mungkin untuk menyeberang jalan besar tanpa dilanggar oleh bas yang datang dari sebelah kanan beliau. Ini sebaliknya bergantung kepada jarak bas tersebut apabila penunggang motosikal tersebut melihatnya dan setakat mana kelajuan bas tersebut dipandu ketika itu. Jarak antara kenderaan-kenderaan tersebut dan kelajuan bas itu dipandu adalah penting di dalam menentukan bila bas tersebut akan berhenti apabila brek ditekan. Satu lagi faktor adalah masa yang diambil untuk menekan brek tersebut. Standard yang digunakan di sini bukanlah seorang pemandu yang sempurna, tetapi pemandu yang menggunakan pemeliharaan dan kemahiran yang biasa. Oleh itu, apabila seorang pemandu bas diletak di dalam keadaan di mana beliau hanya mempunyai sesaat atau dua untuk bertindak dan beliau gagal berbuat demikian, yang hanya disebabkan beliau bukan seorang yang sempurna, beliau tidak boleh dipersalahkan jika satu pelanggaran berlaku kerana pemandu bas tersebut sendiri tidak mewujudkan keadaan kecemasan penunggang motosikal yang muncul dari jalan tepi kecil. Oleh demikian, berdasarkan fakta-fakta kes tersebut, pada keseluruhannya adalah kecuaiian pihak penunggang motosikal yang muncul daripada jalan tepi kecil sedangkan ia adalah tidak selamat berbuat demikian (lihat ms 406D–G, 408A–C, F).]

Notes

For cases on road accident generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 621–826.

Cases referred to

KR Taxi Service Ltd & Anor v Zahariah & Ors [1969] 1 MLJ 49 (refd)

Chan Kay Heng (Chan & Chan) for the plaintiff/appellant.

Perpetua Phang (Reddi & Co) for defendants/respondents.

A Ian Chin J:

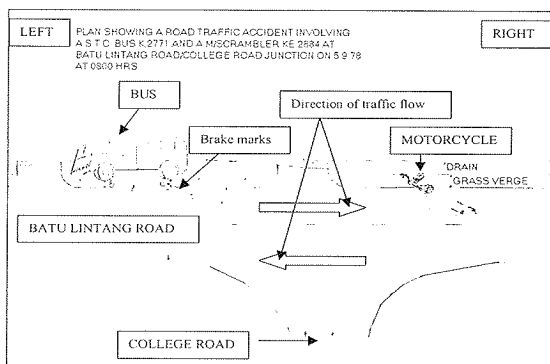
Introduction

- B** This is another one of the many cases where the court has become an impediment to justice instead of dispensing it. The plaintiff/appellant Ng Peng Hong ('motorcyclist') commenced a suit in the High Court in 1981 claiming for damages arising from a motor-vehicle accident and the case was sent down to the sessions court in 1987. The case was then heard in 1992. The sessions court handed down its decision in 1992 where he apportioned 80% liability on the part of the motorcyclist and 20% on the
- C** part of the second defendant/respondent Ng Shaw Ching ('bus driver'). The first defendant/respondent ('the employer') was the employer of the bus driver. A sum of RM40,000 for general damages and RM2,292 for special damages were awarded and to be apportioned in the ratio mentioned earlier. All the parties appealed and had waited since then for the notes of proceedings and grounds of decisions. In the course of my interaction with
- D** the advocates during the hearing of cases the counsel begin to voice their grouse about the many cases they had which are awaiting the grounds of decision. Since the verbal complaint is made by so many counsel, I decided to act and call for a return from all the judicial officers of the lower courts of all cases in which the grounds of decision are pending. Hence a list was compiled and this is just one of the many cases of this particular court.
- E** When this matter was mentioned on 1 December 1999, the parties gave up hope of getting the grounds of decision and agreed that I hear the appeal without the grounds of decision but based on the evidence recorded. Unsatisfactory it may be, there is nothing else that can be done. This court is also tied by the fact that whatever the result of this appeal
- F** there cannot be a retrial for the simple fact that it is now 22 years after the event.

Facts of case and contentions

- G** On 5 September 1978, at about 7.45 am, the plaintiff/appellant was riding a motorcycle on a side road called College Road in Kuching. This road joined a main road called Batu Lintang Road which was then a single carriage way with dual traffic direction. The plaintiff/appellant joined the Batu Lintang Road by making a turn to his right. At about this time, and this is an area of dispute, the first defendant/respondent was driving a bus on Batu Lintang Road but heading the opposite direction to that of the
- H** plaintiff/appellant. A collision occurred between the bus and the motorcycle. At which part of the road did this occur? The evidence of the parties on this point must be viewed against the disinterested evidence of the police officer who went to the scene after the accident and drew a sketch showing the various positions of the vehicles and brake marks after the collision. His sketch is of such remarkable quality though done some
- I** 22 years ago which I miss nowadays that it is best I reproduce the same but after editing it, to replace his handwritings and arrow and adding the words 'LEFT' and 'RIGHT' for the purpose of indicating the direction when such

words are used in this judgment, with the rest of the drawing untouched, viz:



Not in dispute is the fact that the motorcyclist was emerging and turning right from the side road, College Road, onto a main road, Batu Lintang Road. Therefore it was his primary duty to ensure that it was safe to do so as he would be cutting into the paths of oncoming traffics firstly from both his right side and then from his left. Whether it was safe or not depends on whether it was possible to make it to the other side of Batu Lintang Road without being knock down by the bus coming from his right. This in turn depends on, as far as this case is concerned: (1) how far away the bus was when the motorcyclist saw it; and (2) how fast the bus was travelling at that time. The answers to those questions will have a bearing on whether it was safe for the motorcyclist to have emerged. It is a notorious fact and it can be taken notice that a vehicle in motion takes time to stop and that the faster it was travelling, the longer it would take to stop. It must be borne in mind that a vehicle travelling at ten miles per hour (mph) would cover 14.66 feet in a second. Therefore the speed of the car would be one factor in determining when the vehicle would stop after the brake was applied. Another factor is the time taken to apply the brake, that is, how soon one reacts to a situation which calls for the brake to be applied. For this purpose *Bingham's Motor Claims Cases* (7th Ed) at p 107, reproduced a table of the English Highway Code which provides good guideline regarding the distance a vehicle would have travelled, in good weather, in broad daylight and on good dry road, during the time it takes to react to a situation leading to the application of the brake and after the application of the brake, viz:

Speed mph	Thinking Distance Ft	Braking Distance Ft	Overall Stopping distance Ft
60	60	180	240
50	50	125	175

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40	40	80	120
30	30	45	75
20	20	20	40

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That was published around 1956 and technology must have advanced since then to shorten the braking distance. Unfortunately I do not have any evidence of that. The motorcyclist said he saw the bus when it was about 150 to 180 feet away and that when it was 100 feet away he emerged from College Road and turned right to get on Batu Lintang Road. There is no

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evidence as to the speed the bus was travelling at that time and the bus driver only said he was not travelling fast. It was also not put to the bus driver that he was travelling at an excessive speed. Therefore, it has to be assumed, the contrary not having been established nor asserted, that the bus was travelling not in excess of the then maximum statutory limit of 30 mph

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that was prescribed under the Sarawak Road Traffic (Speed Limit) Regulations 1960. This mean that the bus driver would, travelling at 30 mph, have required 75 feet to stop the bus if he had applied the brake immediately after seeing the motorcyclist emerged from College Road and provided he had seen the motorcyclist some 100 feet away. But it is possible

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that the bus driver may not have seen the motorcyclist at 100 feet away because the motorcyclist was still at College Road and about to emerge from it. The time taken for the motorcyclist to come onto Batu Lintang Road and thus into the view of the bus driver was probably one or two seconds. If it was one second the bus would have travelled another 44 feet assuming the bus was travelling at 30 mph. This means by the time the bus

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driver saw the motorcyclist, the distance between the bus and the motorcycle was only fifty-six feet which is a distance insufficient for the bus to stop to avoid the collision. However, it is probable that the bus, as the bus driver himself said, was not travelling very fast and therefore could be at 20 mph. At that speed the bus would have travelled 29.33 feet before the

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motorcyclist came into the view of the bus driver leaving about 71 feet in which to stop to avoid the collision which is more than the 40 feet required as set out in the table above. Since the bus driver had said that the bus was not travelling fast, it is possible that the bus was going at 20 mph and therefore he would have been able to avoid the collision but only by a matter of a second or two. Very much would depend on how fast one reacts and in

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this regard not everyone will be the same. Can someone who reacted a second or two slower and thereby failed to avoid the accident in the circumstances of this case be held to be liable to some extent? The case of *KR Taxi Service Ltd & Anor v Zahariah & Ors* [1969] 1 MLJ 49 (FC), in my view, provides the answer. In that case a vehicle travelling in an

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opposite direction to that of a taxi suddenly crossed the path of the taxi in order to turn into a side road. A collision resulted. The High Court had held the taxi driver to be responsible to the extent of 25%. This was reversed on appeal to the Federal Court where it, pp 52-53, said:

Wilmer LJ was then merely reaffirming and underlining what he had said two years earlier in another case, *Edwards v Nobbs*,⁽²⁾ as follows:

'It is possible that the perfect and most expert driver might have done a little better. The standard, however, is not that of the perfect driver, but the driver using ordinary care and skill.'

With respect it seems to me that unless we hold that the development of the common law of negligence has now reached the stage of imposing strict liability on a person not to injure his neighbour, however blameless, we cannot demand all drivers of vehicles should be perfectionists

So, the bus driver cannot be expected to be a perfectionist. In my view when a bus driver is put in a situation where he has only a second or two to react and he failed to do so is only because he is not a perfectionist and he cannot be blamed if a collision should ensue when the bus driver did not himself create the emergency of the motorcyclist emerging from the minor side road.

I am not unaware that that tremendous advance had been made in the technology concerning the motor industry and the braking system of the vehicle must have improved since the 1956 when the table was first formulated. This means, the cars of seventies as compared to those of the fifties would require a shorter overall stopping distance. But I am unable, due to the lack of evidence, to say to what extent. If there was such evidence, it would have been relevant for me to take into consideration because the bus driver did not apply the brake at all just before the collision. That he did not is demonstrated by the absence in the sketch of brake marks on the road at the portion of the road just before the collision. There were brake marks only after the collision had taken place as the sketch shows. However, as I said earlier, it is only relevant if it can be shown that the bus driver had ample time and not mere seconds in which to apply the brake. This the motorcyclist had failed to do. In my view it was negligent entirely on his part to have emerged from the minor side road when it was not safe to do so.

It is clear from the evidence that the collision had occurred on the side of the road the bus was travelling and that the bus had swerved to the other side of the road on account of the emergency of the situation and after colliding with the motorcycle.

Another matter raised was the rejection of the evidence regarding the bus not having efficient brake. In my view it was correctly rejected since it was not pleaded that the efficient brake had caused or contributed to the accident. It was surprising that when such an objection was taken that counsel did not apply to amend the pleadings.

Since what I have said is sufficient to dispose of this appeal I do not propose to go into the question of quantum.

Conclusion

With the deepest of regret and reluctance I dismiss the appeal of the motorcyclist. The appeal of the bus driver and the employer is allowed. The

A judgment against them is set aside and in its place is the order that the claim of the motorcyclist be dismissed with costs. Costs here also to the bus driver and the employer.

Appeal of the motorcyclist dismissed.

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Reported by Wong Siok Chin

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